No. 9760.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HANS SCHWARTZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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1.

Jurisdiction.

The petition of the appellant for admission to citizenship in the United States under Section 4 of the Naturalization Act of June 29, 1906 (34 Stat. 596; Title 8, U. S. C., Sec. 379) was submitted to the District Court of the United States for the Southern District of California, Central Division upon a stipulation of facts. [R. 8.]

The jurisdiction to naturalize aliens as citizens of the United States is conferred upon the District Courts of the United States by Act of June 29, 1906, Section 3. (34 Stat. 596; Title 8, U. S. C., Sec. 357.)

The decision of the District Court denying the petition of the appellant for citizenship was entered on August 15, 1940. [R. 14.] Notice of appeal was timely filed in this Honorable Court on November 13, 1940 [R. 15],

and the transcript of record upon appeal was timely filed on February 21, 1941. [R. 18.]

Jurisdiction is conferred upon this Honorable Court to review the final decisions of the district courts of the United States by Section 128 of the Judicial Code, as amended (Title 28, U. S. C., Sec. 225 (a)), wherein it is provided that "the Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions . . . in the district courts," except as otherwise provided. The order of the District Court below denying the petition of the appellant for naturalization is a final decision within the meaning of the above section.

Tutun v. United States, 270 U. S. 568;

United States v. Rodiek, 162 Fed. 469 (Ninth Circuit).

2.

Preliminary Statement.

On October 31, 1939, the appellant filed in the court below his petition for naturalization in pursuance to the Naturalization Act of June 29, 1906, as amended. (Secs. 3, 4, 34 Stat. 596; 37 Stat. 737; Title 8, U. S. C., Secs. 357, 379, 382.)

The submission was upon a stipulation of facts, after hearing in open court. [R. 8.] On appeal, the appellant and the appellee have executed an agreed statement upon the facts. [R 2.] The agreed statement is submitted to this Honorable Court for a determination of the points in controversy. [R. 18, 19.]

The facts will be alluded to only to the extent necessary to discuss the propositions presented.

3.
Statement of the Case.

A question of judicial interpretation is raised by this appeal. A determination of the propositions presented involves a judicial construction of the Basic Naturalization Act of June 29, 1906, Section 4, as amended and supplemented. (34 Stat. 596; 45 Stat. 1513; 49 Stat. 1925; 52 Stat. 1247; Title 8, U. S. C., Sec. 382.) The Basic Act has been amended and supplemented by the following enactments material to this appeal:

(1) *Act of March 2, 1929 (Section 6 (b), Chap. 536, 45 Stat. 1513)*

(2) *Act of June 25, 1936 (Section 1, Chap. 811, 49 Stat. 1925.)*

(3) *Act of June 29, 1938 (Chap. 819, 52 Stat. 1247.)*

Section 4 of the Basic Act of June 29, 1906, as amended and supplemented by the above amendments is recorded in Sec. 382 of Title 8, U. S. C., and is set forth in the appendix showing the various transitions through which it has passed.

The primary questions for decision are whether the appellant, who was abroad when the Act of June 25, 1936 became law, could apply for the benefits of that act upon his return to the United States and at any time prior to the hearing on his petition for naturalization; and whether an application for the benefits of the Act of June 25, 1936, could be filed after that act had been repealed in part by the subsequent Act of June 29, 1938. The

appellant is indisputably a beneficiary under the enactments of 1936 and 1938, and no question arises as to this. [R. 4, 5.]

The appellant filed his declaration of intention to become a citizen of the United States on April 14, 1934. He departed from the United States on January 15, 1936, in the employ of an American corporation engaged in the development of foreign trade and commerce of the United States. At the time of his departure the Act of June 29, 1906, as amended March 2, 1929, was in effect. Under the provisions of that act, absence of an alien declarant from the United States for a period of from six months to one year immediately preceding the date upon which he filed his petition for naturalization was presumed to break the continuity of residence required, although such presumption was rebuttable; but absence from the United States for a period of one year or more immediately preceding the date of filing the petition for citizenship definitely broke the continuity of such residence.

However, while the appellant was abroad the Act of June 25, 1936, became law. Under the terms of this amendment it was provided that no period of residence outside the United States would break the continuity of residence, if the alien proved to the satisfaction of the Secretary of Labor[1] and the court that during such resi-

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[1]*Immigration and Naturalization Service of Department of Labor and its functions were transferred to Department of Justice, to be administered under direction and supervision of Attorney General, by Reorg. Plan No. V, effective June 14, 1940.*

dence outside the United States the alien was employed by an American corporation engaged in the development of foreign trade and commerce of the United States. *The Act of 1936 was silent as to the time within which a beneficiary under the Act must make application for the benefits thereof.* The appellant, prior to the passage of the Act of 1936, applied to the Commissioner of Immigration and Naturalization for an extension of time within which to return to the United States in order not to break the continuity of his residence. [R. 3.] In reply, the Commissioner of Immigration and Naturalization advised the appellant that the question of whether the continuity of residence was broken was determined at the time of the naturalization hearing, and forwarded to the appellant a copy of the Act of June 25, 1936. [R. 3, 4.]

The appellant returned to the United States on September 20, 1937, and on June 12, 1939 made formal application to the Secretary of Labor[1] for the benefits of the Act of June 25, 1936. [R. 4.] The Secretary of Labor[1] concluded that the appellant was a beneficiary under the 1936 enactment, but left for the determination of the court below the question whether the appellant had made application within the time required by the Act of June 25, 1936. The court below concluded that the appellant's application was not timely. [R. 4, 5.]

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[1]*Immigration and Naturalization Service of Department of Labor and its functions were transferred to Department of Justice, to be administered under direction and supervision of Attorney General, by Reorg. Plan No. V, effective June 14, 1940.*

4.
Questions Involved

1. Whether an alien declarant who was absent from the United States in the employ of an American corporation engaged in the development of foreign trade and commerce of the United States when the Act of June 25, 1936 became law may apply for the benefits of that act upon his return to the United States and at any time prior to the hearing on his petition for naturalization.

2. Whether an alien declarant who was absent from the United States in the employ of an American corporation engaged in the development of foreign trade and commerce of the United States when the Act of June 25, 1936 became law may apply for the benefits of that act after that act was repealed in part by the subsequent Act of June 29, 1938.

5.
Summary of Argument.

1. An alien declarant for United States citizenship who was absent from the United States when the Act of June 25, 1936 became law, and who was employed by an American corporation engaged in the development of foreign trade and commerce of the United States, may apply for the benefits of that act upon his return to the United States and at any time prior to the hearing on his petition for naturalization.

2. An alien declarant for United States citizenship residing abroad at the time of the passage of the Act of June 25, 1936, engaged in the activities enumerated in the act may make application for the benefits thereof upon his return to the United States at any time prior to the hearing on his petition for naturalization, even after that act had been repealed in part by the subsequent Act of June 29, 1938.

6.
ARGUMENT.

1. An Alien Declarant for United States Citizenship, Who Was Absent From the United States When the Act of June 25, 1936, Became Law, an Who Was Employed by an American Corporation Engaged in the Development of Foreign Trade and Commerce of the United States, May Apply for the Benefits of That Act Upon His Return to the United States and at Any Time Prior to the Hearing on His Petition for Naturalization.

The Basic Naturalization Act of June 29, 1906, Sec. 4, has undergone a series of changes. The Basic Act was amended on March 2, 1929. (45 Stat. 1516.) Prior to July 1, 1929, the Naturalization Law required that the court admitting an alien to citizenship should be satisfied that during the 5 years immediately preceding the filing of his petition he had resided continuously in the United States. (34 Stat. 596; Title 8 U. S. C., Sec. 382.) Furthermore, it was provided that no alien should be admitted to become a citizen who had not, for a continued term of five years next preceding admission, resided within the United States. Whether there was a break in the continuity of residence was determined at the time the application for naturalization came up for hearing. (Rev. Stat. 2170; Title 8, U. S. C., Sec. 361.)

Experience in the administration of these provisions demonstrated that it was not feasible to secure a uniform application of the law with respect to the naturalization of aliens who had been absent from the United States within the period of 5 years immediately prior to the filing of the petition.

Consequently, on March 2nd, 1929, Congress enacted a provision which became effective on July 1st of that year containing a rule of evidence on the question of absence. The rule provided that absence from the United States for a continuous period of more than six months and less than one year during the interval immediately preceding the filing of the petition that the law requires continuous residence in the United States should be presumed to break the residence, but that such presumption might be overcome upon the presentation of evidence satisfactory to the court that a reasonable cause had existed for not returning to the United States prior to the expiration of such six months. It further provided that absence for a continuous period of one year or more during the interval that the law required continuous residence within the United States, broke the continuity of residence. (45 Stat. 1513; Title 8 U. S. C., Sec. 382 Supp.).

The rule of evidence established by the Act of March 2nd, 129, still remains in force; but by the Act of June 25, 1936 (49 Stat. 1925; Title 8 U. S. C., Sec. 382 Supp.) this rule of evidence was relaxed in behalf of a certain class of aliens, who clearly indicated their intention to become citizens, but who were possessed of such outstanding ability as to justify the United States Government, or an American institution of research, or American organizations engaged in extending the international demand for products of the United States in sending such aliens to foreign countries to exercise their recognized ability. Congress felt that such outstanding aliens should not be unnecessarily penalized in their evident desire to become citizens simply for the reason that their absence from the United States on such beneficial activities prevented the precise compliance with the five years con-

tinuous residence requirement of the existing naturalization law. Accordingly, Congress enacted the measure of June 25, 1936, which preserved the continuity of residence in the United States for naturalization purposes only in the cases of aliens benefited by the act during the period their contract required absence from the United States, and served to facilitate favorable consideration of their petitions for citizenship certificates within the life of existing valid declarations of intention to become citizens. *Senate Rep. No. 2159,* 74th Cong., 2d Sess. (1936).

The Act of June 25, 1936, was divided into two sections. Section 1 of the act added an exception to the continuity of residence requirement of the Act of March 2, 1929, by adding to that act the following:

> ". . . except that in the case of an alien declarant for citizenship employed by or under contract with the Government of the United States or an American institution of research recognized as such by the Secretary of Labor, or employed by an American firm or corporation engaged in whole or in part in the development of export trade from the United States or a subsidiary thereof, no person of residence outside the United States shall break the continuity of residence if (1) prior to the beginning of such period (whether such period begins before or after his departure from the United States) the alien has established to the satisfaction of the Secretary of Labor that his absence from the United States for such period is to be on behalf of such Government, or for the purpose of carrying on scientific research on behalf of such institution, or to be engaged in the development of such export trade or whose residence

abroad is necessary to the protection of the property rights in such countries of such firm or corporation, and (2) such alien proves to the satisfaction of the court that his absence from the United States for such period has been for such purpose."

Section 2 of the Act of June 25, 1936 was as follows:

"No period of residence outside the United States during the five years immediately preceding the enactment of this amendatory Act shall be held to have broken the continuity of residence required by the naturalization laws if the alien proves to the satisfaction of the Secretary of Labor and the court that during all such period of absence he has been under employment by, or contract with, the United States, or such American institution of research, or American firm or corporation, described above in this section, and has been carrying on the activities described in this Act in their behalf."

The language of Section 2 of the Act of June 25, 1936, is silent as to the time within which an application must be made for the benefits afforded by this remedial legislation. To be the recipient of the advantages afforded by the act, Congress provided only that a beneficiary satisfy the Secretary of Labor[1] and the court that he was carrying on the activities described in the act. This raises a question of judicial interpretation as to when a beneficiary under the act must apply for the benefits thereof.

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[1]*Immigration and Naturalization Service of Department of Labor and its functions were transferred to Department of Justice, to be administered under direction and supervision of Attorney General, by Reorg. Plan No. V, effective June 14, 1940.*

The Act of June 25, 1936 has not been construed by any Circuit Court of Appeals. The precise question involved in this appeal, however, was judicially determined by the United States District Court for the Northern District of Illinois in the case of *In Re Zaoral.* Since the decision in the *Zaoral case* is unreported a copy of this decision has been included in the Appendix. The court below was disinclined to follow the decision in the *Zaoral case.* [R. 14.]

It will be noted that the facts in the *Zaoral case* are similar to the facts in the present case. Mr. Zaoral, like appellant here, was, at the time of the passage of the Act of June 25, 1936, in a foreign country, engaged in the employ of an American firm. Mr. Zaoral did not apply for the benefits of that act until after the enactment of the Act of June 29, 1938. One of the questions ruled upon by the court in the *Zaoral case* was:

> "3. Construction of the Act of June 25, 1936, to determine the time within which application for its benefits must be made."

The court in the *Zaoral case* held that the Act of June 25, 1936 was remedial legislation designed to aid persons who are engaged in promoting the interests of the United States in foreign countries, and should be given a liberal construction which would accomplish its purpose, and concluded that under such a construction an alien who had been continuously employed in the service of an American firm, developing foreign trade and commerce of the United States, might, at any time upon his return to the United

States after June 25, 1936, present his application and be given the benefits of the said act.

Congress intended the Act of June 25, 1936 to be remedial legislation and the Senate Committee on Immigration when the Bill was submitted for Congressional approval stated:

> "Your committee is of the opinion that consideration should be extended and proper relief granted to that class of aliens who have clearly indicated their intention to become citizens and who are possessed with such outstanding ability as to justify the United States Government, American institutions of research, or American organizations engaged in extending the international demand for products of the United States, in sending them to foreign countries to exercise their recognized ability.
>
> "Your committee feels that such outstanding aliens should not be unnecessarily penalized in their evident desire to become citizens simply for the reason that their absence from the United States on such beneficial activities prevents the precise compliance with the five years continuance residence requirement of the existing naturalization laws."
>
> *Senate Rep. No. 2159*, 74th Cong., 2d Sess. (1936).

It is well settled that remedial legislation should be construed liberally to carry out the wise and salutary purposes of its enactment.

Stewart v. Kahn, 11 Wall. 493;

Home Life Insurance Co. v. Dunn, 19 Wall. 214;

Metropolitan Railroad Co. v. District of Columbia, 132 U. S. 1;

United States of America v. New York Steam Fitting Co., 235 U. S. 327;

Heitler v. United States, 260 U. S. 438;

McDonald v. Thompson, 305 U. S. 263;

Federal Housing Administration v. Burr, 309 U. S. 242.

The construction of the 1936 Act contended for by the appellant is strengthened by the fact that in his desire to protect the continuity of his residence appellant communicated with the Commissioner of Immigration and Naturalization, stating that he did not desire to lose the benefits accruing to him under his declaration of intention. [R. 3.] To this communication the appellant received a reply signed by a deputy commissioner of immigration and naturalization, enclosing a copy of the Act of June 25, 1936, and stating that the question of whether or not an absence from the United States had broken the continuity of residence for naturalization purposes was "determined only at the time the application for naturalization comes up for hearing." [R. 3, 4.]

It is submitted that the liberal construction given to the Act of June 25, 1936, by the District Court in the *Zaoral case* is in consonance with the intents and purposes of Congress in passing this remedial legislation, and that under that interpretation the appellant should be entitled to the benefits afforded under that act. The strict and technical construction given to the act by the court below is at war with the intendments of Congress and serves to unnecessarily penalize the appellant in his evident desire to become a citizen of the United States.

2. **An Alien Declarant for United States Citizenship, Residing Abroad at the Time of the Passage of the Act of June 25, 1936, Engaged in the Activities Enumerated in the Act May Make Application for the Benefits Thereof Upon His Return to the United States at Any Time Prior to the Hearing on His Petition for Naturalization, Even After That Act Had Been Repealed in Part by the Subsequent Act of June 29, 1938.**

The Act of June 25, 1936, was subsequently amended by the Act of June 29, 1938. By the latter act portions of the 1936 enactment were retained, while other portions were repealed. [See Appendix.] One of the purposes of the 1938 enactment was to restrict the scope of operation of the Naturalization Law in relation to the naturalization of aliens who were absent from the United States for extended periods by reason of the nature of their employment. Experience with the administration of the 1936 Act disclosed that aliens employed abroad within the categories described in the act, but who had apparently not maintained residence in the United States or had not been in the United States, applied for immigration visas, secured leave of absence from their employment, came to the United States where they ostensibly secured lawful admission for permanent residence, made declaration of intention to become a citizen of the United States, applied to the Secretary of Labor[1] for a finding that absence from the United States was to be for one of the purposes described in the 1936 enactment and thereafter departed

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[1]*Immigration and Naturalization Service of Department of Labor and its functions were transferred to Department of Justice, to be administered under direction and supervision of Attorney General, by Reorg. Plan No. V, effective June 14, 1940.*

from the United States and resumed the performances of the duties in which they had previously been engaged.

Thus, it was intended by the 1938 Act to limit the scope of operation of the Naturalization Law to those who had resided within the United States continuously without an absence in excess of one year, or who had resided here for at least one year subsequent to lawful admission for permanent residence, and thereafter engaged in the employment of the character described in the act.

Section 1 of the Act of June 25, 1936, was omitted in the 1938 enactment, while Section 2 of the 1936 Act was left unchanged. It will also be noted that in the 1938 Act there was a savings clause to the effect that:

> "This amendment shall not affect cases of aliens who, prior to the date of its enactment, have established to the satisfaction of the Secretary of Labor pursuant to an Act . . . approved June 25, 1936, that absence from the United States was to be or had been for the purposes of carrying on activities described therein."

Thus, a further question of judicial interpretation arises as to whether Congress intended that an alien who could have obtained benefits under Section 1 of the 1936 Act is precluded from obtaining those benefits after the apparent repeal of Section 1 by the Act of June 29, 1938, or whether by the retention of Section 2, which refers to Section 1 of the 1936 Act, and the addition of the savings clause to the June 29, 1938, Act, such benefits could still be obtained by the appellant if compliance with Section 1 could be shown.

The court in the *Zaoral case* had before it the question as to whether an application for the benefits of the Act of

June 25, 1936, could be made after that act had been repealed in part by the Act of June 29, 1938. In the *Zaoral case* the court stated the problem as follows:

> "4. Construction of the Act [of June 25, 1936] as amended by the joint resolution of Congress passed June 29, 1938, which further amended the Naturalization Laws to provide that absence of one year or more from the United States would break the continuity of such residence, except in cases where the absence was for the purpose stated in the Act of June 25, 1936, and the Secretary of Labor has so found and the court likewise was satisfied in that respect."

The court in the *Zaoral case* concluded that under the construction of the Act of June 25, 1936, which would enable persons belonging to the classes intended to be aided to claim the benefits of the act at any time prior to filing a petition for naturalization, such aliens may make such application for the benefits of the 1936 Act even after the passage of the Act of June 29, 1938, and the establishment of the facts concerning employment to the satisfaction of the Secretary of Labor at any time prior to the filing of a petition for naturalization constituted an establishment "pursuant to" the Act of 1936 within the meaning of the savings clause of the 1938 enactment.

Conclusion.

For the foregoing reasons it is respectfully submitted that the decision of the lower court in this case should be reversed.

Respectfully submitted,

O'Connor, Gray & Strock,
By William V. O'Connor,
Attorneys for Appellant.

APPENDIX.

Opinion of Hon. Michael L. Igoe, in In re Zaoral.

United States District Court, Northern District of Illinois, Eastern Division.

In the Matter of the Petition of Charles Theodore Zaoral, Petitioner. No. 172440.

The Petition of Charles Theodore Zaoral to be admitted as a citizen of the United States was submitted on stipulation that the Court should consider the evidence taken before the Examiner without any recommendations or findings by him. The Court was also furnished with a copy of a Memorandum signed by the Solicitor of the Department of Labor to the Commissioner of Immigration and Naturalization, and a Memorandum on behalf of the Petitioner.

From the evidence it appears that Charles T. Zaoral, a citizen of Austria, came to the United States on November 2, 1923, as a quota immigrant, and in December, 1923, filed a Declaration of Intention in the Montgomery County Court at Norristown, Pennsylvania. Soon thereafter he entered the employ of Dodge Brothers, Inc., in Chicago. On November 26, 1926, he married a citizen of the United States. On December 2, 1926, he was sent by Dodge Brothers, Inc., to South Africa on business of that Company, and remained in South Africa in such employment up to August, 1927, when he returned to Detroit, continuing in the employment of Dodge Brothers, Inc., until on or about March 1, 1930.

On March 5, 1939, Mr. Zaoral filed a Petition for Naturalization in Detroit, Michigan, but due to change of

address did not receive notice of the hearing on his Petition prior to his departure from the United States on March 5, 1930, in the employ of a subsidiary of the General Motors Corporation located in Germany. The Petition came on for hearing in the United States District Court in Detroit on March 27, 1930. Mr. Zaoral being absent and not having received any notice of the hearing, the Petition was denied because of absence—failure to prove five years' residence.

From March 5, 1930, to July 13, 1936, Mr. Zaoral remained in Germany in the course of his employment with the subsidiary of General Motors Corporation. On July 13, 1936, he returned to the United States, in the course of his employment, bringing a group of German business men to visit the corporation's plants and offices in Detroit and in New York, and remained until August 1, 1936, when he returned with the same group of men to Germany. He remained in Germany until July 18, 1938, when he came to the United States. On August 12, 1938, he made application to the Secretary of Labor for a finding that his employment by an American corporation in its foreign business continuously during said period entitled him to the benefits of the Act of June 25, 1936 (49 Stat. 1925), as a consequence of which his residence abroad might properly be construed as residence in the United States for naturalization purposes.

This application was denied September 21, 1938, apparently because the 1936 Act had been considered by the Department of Labor as partially repealed by the Act of June 29, 1938 (52 Stat. 1247), and it was thought that his case was not within the saving clause of the 1938 Act with respect to cases under the 1936 Act. Thereafter, Mr.

Zaoral requested a reconsideration of the Department's ruling, and the facts of the case were reconsidered and treated as an application for the benefits of the Act of June 25, 1936, as amended by the Act of June 29, 1938. Consideration was given the case as such by the Board of Review, which rendered a decision on December 15, 1938, recommending that the application be not approved. However, at a later date, about February 15, 1939, the Secretary of Labor made a finding that "she was satisfied with facts in the Charles T. Zaoral case that alien's employment abroad comes within the terms of the Act of June 25, 1936, but the Court should be asked to rule on all questions presented by case."

The evidence shows conclusively that the Petitioner meets all of the requirements of the Naturalization Laws with the possible exception of the requirement as to residence. The facts of the case present several questions of construction of the provisions of the Act of June 25, 1936, and the Act of June 29, 1938, as well as a question concerning the effect on both of these Acts of the Cable Act of September 22, 1922, as amended by the Act of May 24, 1934 (48 Stat. 797-8).

In the presentation of the case the Director of Immigration has raised the following points for the consideration of the Court:

1. Is there a sufficient Declaration of Intention on file to bring Petitioner within the meaning of the Naturalization Laws and enable him to take advantage of the Law as amended by the Act of June 25, 1936?

2. Did the return to the United States on July 13, 1936, at which time the Petitioner remained in the United States on the employer's business until August 1, 1936, break the continuity of his residence within the meaning of the Naturalization Laws as amended by the Act of June 25, 1936?
3. Construction of the Act of June 25, 1936, to determine the time within which application for its benefits must be made.
4. Construction of the Act as amended by the joint resolution of Congress passed June 29, 1938, which further amended the Naturalization Laws to provide that absence of one year or more from the United States would break the continuity of such residence, except in cases where the absence was for the purpose stated in the Act of June 25, 1936, and the Secretary of Labor has so found and the Court likewise was satisfied in that respect.

(1) In regard to the point raised by the Government that no valid Declaration of Intention was on file at the time of the filing of the Naturalization Petition on September 26, 1938, the Petitioner contends that his marriage to a citizen of the United States on November 26, 1926, entitled him to favored treatment under the 1922 Act, as amended by the 1934 Act, which provides that no Declaration of Intention shall be required of aliens marrying citizens of the United States after the passage of the Act of 1922, "as here amended." This language has been construed by the Courts to confer the benefits of the 1934 Act upon an alien marrying a citizen after the enactment of the 1922 Act but before the enactment of the 1934

amendment. United States v. Balestra (C. C. A., Pa. 1937), 88 Fed. (2nd) 43; United States v. Bradley (C. C. A., Ill. 1936), 83 Fed. (2nd) 483.

Section 1 of the 1936 Act in terms confers the exception in the case of an "alien declarant" and the later amendatory Act of 1938 also makes the exception,

> ". . . in the case of an alien—
>
> . . . . . .
>
> "(c) Who has made a declaration of intention to become a citizen of the United States. . . ."

In recommending that the application be not approved, the Board of Review ruled that the Act of September 22, 1922, as amended, does not in any way modify the requirements of the Act of June 25, 1936, as amended on June 29, 1938, that both the 1936 and 1938 Acts were intended to apply only in the cases of aliens falling specifically within the terms of those Acts, and that both of those Acts refer to aliens who had filed valid declarations of intention.

It is contended by the Petitioner that the 1922 Act, as amended by the 1934 Act, should not be ignored if full effect is to be given to its manifest intention. The 1934 Act provides that an alien who marries a citizen of the United States after the enactment of the 1922 Act,

> "may be naturalized upon full compliance with all requirements of the naturalization laws with the following exceptions:
>
> "(a) No declaration of intention shall be required, . . ."

It would seem that the form of this Act should be considered in its construction. The exception is an exception to compliance with "the naturalization laws." This general reference to "the naturalization laws" indicates a Congressional intent to embrace the whole body of laws relating to the subject of naturalization, and the exception may very well be construed by the courts to relieve the favored class of aliens from the requirements of filing a declaration of intention wherever such a requirement appears in the naturalization laws.

This Act has not been repealed and the Petitioner contends that to adopt the construction of the Board of Review would produce the result that the Acts of 1936 and 1938, purely remedial in character, would operate to deny their remedies to a class of aliens clearly favored by the 1934 amendment or operate to nullify the 1934 amendment in fact.

It was clearly not the intention of Congress by any legislation after 1934 to repeal the 1934 amendment, nor can there be any reason found in any later legislation to cause the court or any department of the Government to ignore the plain provision of this statute. The Acts of 1936 and 1938 were passed for the purpose of aiding certain classes of persons who were engaged in work for the Government, or for businesses which aided, among other things, our foreign commerce. These Acts certainly were not intended to require declarations of intention which by a previous law had been specifically not required of certain persons named therein. With the 1934 amendment still in full force and effect, and with no provision in the Acts of 1936 and 1938 which could by any stretch of the imagination limit or modify or amend the provision that "no

declaration of intention shall be required by an alien married to a citizen of the United States," the Court holds that the Petition in the case at bar was not required to file a Declaration of Intention. The Act of June 25, 1936, was intended to apply to a group of alien declarants who were ready to apply for citizenship. Mr. Zaoral, being married to an American citizen, was in that group and under the Act of 1934 he was specifically excused from filing a declaration.

(2) The next question raised by the Department of Labor is: "Did the return to the United States on July 13, 1936, at which time the Petitioner remained in the United States on the employer's business until August 1, 1936, break the continuity of his residence within the meaning of the Naturalization Laws as amended by the Act of June 25, 1936?"

It appears that the Petitioner did not make application for the benefits of the 1936 Act until August 12, 1938, which was after the enactment of the 1938 amendment. The Department of Labor contends that in order that the Petition of September 26, 1938, could be favorably considered, it would be necessary for Zaoral to show continuous residence within the United States for at least three years, assuming that he is entitled to the benefits of the 1934 amendment to the Cable Act of 1922, and is not required to file a Declaration of Intention. He must, therefore, show continuous residence since September 26, 1935. On that date, and thereafter until July 13, 1936, and again from August 1, 1936, until July 18, 1938, he was abroad in Germany in the employ of a subsidiary of General Motors Corporation.

The first paragraph of the fourth subdivision of Section 4 of the Act of June 29, 1906, as amended, deals with the requirements and proof as to residence, character, and attachment to the Constitution, required to be shown by aliens generally as conditions precedent to admission to citizenship, and provides that,

> "Fourth. No alien shall be admitted to citizenship unless
>
> "(1) Immediately preceding the date of his petition the alien has resided continuously within the United States for at least five years . . ."

The second paragraph deals with the effect of absence from the United States and provides in part:

> "Absence from the United States for a continuous period of one year or more during the period immediately preceding the date of filing a petition for citizenship for which continuous residence is required as a condition precedent to admission to citizenship shall break the continuity of such residence."

If the Petitioner has been absent for more than a year, no matter what country he had been in and no matter what the circumstances might be, he lost his residence and it was necessary to deny his Petition. Then came the amendment of June 25, 1936, Section 1 of which amends the last quoted provision by adding the following exception:

> "Except that in the case of an alien declarant for citizenship . . . employed by an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States or a subsidiary thereof, no period of residence outside of the United States shall break the

continuity of residence if (1) prior to the beginning of such period (whether such period begins before or after his departure from the United States) the alien has established to the satisfaction of the Secretary of Labor that his absence from the United States for such period is to be . . . engaged in the developed of such foreign trade and commerce . . . and (2) such alien proves to the satisfaction of the court that his absence from the United States for such period has been for such purposes."

Section 2 of the Act of June 25, 1936, provides:

"Section 2. No period of residence outside the United States during the five years immediately preceding the enactment of this act shall be held to have broken the continuity of residence required by the naturalization laws if the alien proves to the satisfaction of the Secretary of Labor and the Court that during all such period of absence he has been under employment by, or contract with, the United States, or such American institution of research, or American firm or corporation, described in Section 1 hereof, and has been carrying on the activities described in this Act in their behalf (49 Stat. 1925)."

With respect to his absence during the period from September 26, 1935 to June 25, 1936, it was agreed that Zaoral may take advantage of the provisions of Section 2 of the 1936 Act. It will be noted that the language of this Section is silent as to the time for making an application for its benefits. Consequently, it would seem that upon making the required showing concerning his employment, at any time after the passage of the 1936 Act, Zaoral will become entitled to a finding that he was a resident of the United States during the period between

September 26, 1935, and June 25, 1936. The period from June 25, 1936, until July 13, 1936, need give no concern since it was less than 6 months and therefore occasions not even a presumption of a break in the required continuity of residence.

As to the period of time from July 13, 1936 to August 1, 1936, Zaoral was in the United States on business of his employer and performing duties arising out of and in the course of such employment. It is clear that his residence abroad, within the meaning of Section 2 of the Act of June 25, 1936, could not be construed to have been interrupted by this business trip, and it is equally true that it would have been useless to file a petition for naturalization, during this time, because proof of the required facts could not be made to the satisfaction of the court until the alien had been in this country at least 90 days (the time which must elapse between the filing of a naturalization petition and the hearing). It should therefore be held by the court, that the continuity of residence abroad was not broken by the trip to the United States.

(3) With respect to the absence of Zaoral during the period from August 1, 1936, to July 18, 1938, the Government contends that he must establish his continuous residence under the provisions of Section 1 of the Act of June 25, 1936, if at all.

On behalf of Mr. Zaoral it has been urged that a proper construction of Section 1 of the Act of 1936 should not require application for the benefits of the Act prior to the beginning of a period of residence abroad in the case of aliens who were in fact residing abroad at the time of the passage of the Act. Otherwise, it is urged, an alien resident abroad at the time of the pas-

sage of the Act, and engaged in employment which would entitle him to the benefits of the Act, could not, without actually returning to the United States, avoid a break in the continuity of his residence in the United States after June 25, 1936. Hence, it is contended, application for the benefits of the 1936 Act prior to the commencement of a period of residence abroad should be required only of those aliens who commence periods of residence abroad after the passage of the Act; and in the case of aliens resident abroad at the time of the passage of the Act, and whose residence abroad during the preceding five years is specifically covered by Section 2 of the Act, the Department of Labor should adopt a construction of the Act permitting the establishment of the facts to the satisfaction of the Secretary of Labor at any time prior to the hearing on the naturalization petition.

On behalf of Mr. Zaoral it is further urged that with the Act of 1934 still in effect, he was actually an alien declarant within the meaning of the law; that under Section 2 of the Act of June 25, 1936, he was not required to return to the United States for the purpose of obtaining the consent, or establishing to the satisfaction of the Secretary of Labor that his residence away from the United States was for the purpose of engaging in the development of foreign trade and commerce in the employ of an American firm or corporation, but that he may any time after the passage of the Act of June 25, 1936, if still so engaged, return to the United States and file his petition for naturalization, and if he shows to the satisfactions of the Secretary of Labor and the Court that during all such period of absence he has been employed by an American firm or corporation, he may be entitled to citizenship.

In its consideration of the case, the Board of Review regarded the lack of a valid Declaration of Intention as fatal and refused to approve the petition. The District Director in Chicago suggested to the Department that the case be discussed on the alternative assumption that the Act of 1934 excused this omission and that consideration be given of whether or not Zaoral's application for the benefits of the 1936 Act had been made in apt time. The Central Office again denied the Petition on the ground that Mr. Zaoral had a period of one year from June 25, 1936, to June 25, 1937, in which to make application for the benefits of the Act in question. Not having made this application until after he had been absent from the United States for a continuous period of more than one year subsequent to June 25, 1936, the continuity of his residence within the meaning of the Act of June 25, 1936, had been broken.

This position of the Government makes it necessary to construe the Act of June 25, 1936, to determine the time in which the application must be made in order to obtain the benefits of the Act. There is nothing in the Act itself limiting the time in which application for its benefits must be made. The Government has laid down a rule, or regulation, which has no support in the Law, but is simply and solely an administrative construction which, in the case at bar, would operate to deny the benefits of the Act to one of the class which it seeks to aid.

It is believed that the statement in Section 2 of the Act of June 25, 1936:

> "No period of residence outside the United States during the five years immediately preceding the enactment of this Act (June 25, 1936) shall be held to have broken the continuity of residence, etc.,"

was intended to give the Act a retroactive effect and was not in any way intended as a limitation on the submission of an application at a later date or for a longer period of residence.

It should be borne in mind that the Act of June 25, 1936 was remedial legislation designed to aid persons who were engaged in promoting the interests of the United States in foreign countries and should be given a liberal construction which would accomplish its purpose. Under such a construction the failure of Petitioner to make his Application for Naturalization until his return to the United States in 1938, which was more than one year after June 25, 1936, is not fatal, as his employment had not been interrupted or changed and he had applied at his first opportunity to become a citizen. The continuity of his residence within the meaning of the Naturalization Laws had not been broken.

(4) On June 29, 1938, the Naturalization Laws were further amended to provide that:

> "Absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship immediately preceding or during the period between the date of filing the petition and the date of final hearing, shall break the continuity of such residence."

The last paragraph of the 1938 Act, however, provides:

> "This amendment shall not affect cases of aliens who prior to the date of its enactment have established to the satisfaction of the Secretary of Labor, pursuant to an Act entitled 'An Act to amend the naturalization laws in respect to residence requirements, and for other purposes', approved June 25, 1936, that absence from the United States was to be or had been for the purpose of carrying on activities described therein."

Under the construction of the Act of June 25, 1936, which would enable persons belonging to the classes intended to be aided to claim the benefits of the Act at any time prior to filing a petition, it would seem that such aliens may make such application for the benefits of the 1936 Act even after the passage of the 1938 Act, and the establishment of the facts concerning their employment to the satisfaction of the Secretary of Labor at any time prior to the filing of a petition for naturalization will constitute an establishment "pursuant to" the 1936 Act.

In construing Section 2 of the Act of June 25, 1936, as in full force and effect, no violence is done to the 1938 amendment. If it had been the intention of Congress to repeal or limit the Act of June 25, 1936, it should have been done by proper provision. The mere failure to mention Section 2 of the 1936 Act, while mentioning Section 1, is not sufficient reason for considering Section 2 as being repealed by implication. This is especially true when there is no conflict between the Acts of 1936 and 1938.

RECAPITULATION.

The facts as stated have been agreed upon by counsel for the Government and counsel for the Petitioner as a proper statement of the case before the Court. The Secretary of Labor is satisfied with all facts in the Zaoral matter, and that alien's employment abroad comes within the terms of the Act of June 25, 1936. The Court is asked to rule on all questions presented and makes the following ruling:

1. That under a proper construction of the 1934 amendment to the Cable Act of 1922 the Petitioner and others similarly situated, are relieved from the requirements of filing a Declaration of Intention for the purposes of the 1936 and 1938 Acts.

2. The return to the United States in July, 1936, at which time the Petitioner remained in the United States on the employer's business until August 1, 1936, did not break the continuity of his residence within the meaning of the Act as amended in 1936, for the reason that he was during all such time actually in the service of his employer and his filing of a Petition for Naturalization at that time would have been unavailing and useless.

3. Section 2 of the Act of June 25, 1936, is in full force and effect and was not repealed or modified by the joint resolution of Congress passed in 1938.

4. A proper construction of Section 1 of the Act of June 25, 1936, should not require application for the benefits of the Act prior to the beginning of a period of residence abroad in the case of aliens who were, in fact, residing abroad at the time of the passage of the Act and were engaged in the activities enumerated in the Act. The Act of June 25, 1936 was remedial legislation and designed to aid persons who were engaged in promoting the interests of the United States in foreign countries and should be given a liberal construction which would accomplish its purpose. Under such a construction an alien who had been continuously employed in the service of an American owned corporation in its foreign trade might any time upon his return to the United States after June 25, 1936, present his application and be given the benefits of the Act of 1936 as a resident in a foreign country while in the employ of an American owned corporation.

5. The Act of June 25, 1936, properly construed, would enable persons belonging to the classes intended to be aided to claim the benefits of the Act at any time prior to filing a petition, and such aliens may make such application for the benefits of the 1936 Act even after the passage of the 1938 Act, and the establishment of the facts concerning their employment to the satisfaction of the Secretary of Labor at any time prior to the filing of a Petition for Naturalization will constitute an establishment "pursuant to" the 1936 Act.

6. Section 2 of the Act of June 25, 1936, which provides:

"No period of residence outside the United States during the five years immediately preceding the enactment of this Act (June 25, 1936) shall be held to have broken the continuity of residence, etc."

was intended to give the Act a retroactive effect and was not in any way intended as a limitation on the submission of an application at a later date or for a longer period of residence.

MICHAEL L. IGOE,
Judge United States District Court.

Dated: February 17, 1939.

Basic Naturalization Act of June 29, 1906, as Amended, and as Reported by the House Committee on Immigration and Naturalization Is Set Forth as Follows:

"In compliance with paragraph 2-A of rule 13 of the Rules of the House of Representatives, changes in existing law made by this resolution are shown in the copy of existing law set out herein as follows (existing law in which no change is made is printed in roman, omitted matter is printed within black brackets, and the new matter is printed in italic):

"Fourth Division of Section 4, Naturalization Act of June 29, 1906 (U. S. C. Title 8, Sec. 382), as Amended.

"Fourth. No alien shall be admitted to citizenship unless (1) immediately preceding the date of his petition the alien has resided continuously within the United States for at least five years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3) during all the periods referred to in this subdivision he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. At the hearing of the petition, residence in the county where the petitioner resides at the time of filing his petition, and the other qualifications required by the subdivision during such residence, shall be proved by the oral testimony of at least two credible witnesses, citizens of the United States, in addition to the affidavits required

by this act to be included in the petition. If the petitioner has resided in two or more places in such county and for this reason two witnesses cannot be procured to testify as to all such residence, it may be proved by the oral testimony of two such witnesses for each such place of residence, in addition to the affidavits required by this act to be included in the petition. At the hearing, residence within the United States but outside the county, and the other qualifications required by this subdivision during such residence, shall be proved either by depositions made before a naturalization examiner or by the oral testimony of at least two such witnesses for each place of residence.

"[If an individual returns to the country of his allegiance and remains therein for a continuous period of more than six months and less than one year during the period immediately preceding the date of filing the petition for citizenship for which continuous residence is required as a condition precedent to admission to citizenship, the continuity of such residence shall be presumed to be broken, but such presumption may be overcome by the presentation of satisfactory evidence that such individual had a reasonable cause for not returning to the United States prior to the expiration of such six months. Absence from the United States for a continuous period of one year or more during the period immediately preceding the date of filing the petition for citizenship for which continuous residence is required as a condition precedent to admission to citizenship shall break the continuity of such residence, except that in the case of an alien declarant for citizenship employed by or under contract with the Government of the United States or an American institution of research recognized as such by the Secretary of Labor, or employed by an American firm or corporation engaged in

whole or in part in the development of foreign trade and commerce of the United States or a subsidiary thereof, no period of residence outside the United States shall break the continuity of residence if (1) prior to the beginning of such period (whether such period begins before or after his departure from the United States) the alien has established to the satisfaction of the Secretary of Labor that his absence from the United States for such period is to be on behalf of such Government, or for the purpose of carrying on scientific research on behalf of such institution, or to be engaged in the development of such foreign trade and commerce or whose residence abroad is necessary to the protection of the property rights in such countries of such firm or corporation, and (2) such alien proves to the satisfaction of the court that his absence from the United States for such period has been for such purpose.]

"Absence from the United States for a continuous period of more than six months and less than one year during the period for which continuous residence is required for admission to citizenship, immediately preceding the date of filing the petition for naturalization, or during the period between the date of filing the petition, and the date of final hearing, shall be presumed to break the continuity of such residence, but such presumption may be overcome by the presentation to the naturalization court of satisfactory evidence that such individual had a reasonable cause for not returning to the United States during such absence. Absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship immediately preceding the date of filing the petition for naturalization or during the period between the date of filing the petition and the date of final hearing,

shall break the continuity of such residence, except that in the case of an alien—

"(a) who has been lawfully admitted into the United States for permanent residence;

"(b) who has resided in the United States for at least one year thereafter; and

"(c) who has made a declaration of intention to become a citizen of the United States, who shall be deemed an eligible alien for the purposes of this paragraph, and who thereafter has been sent abroad as an employee of or under contract with the Government of the United States or who thereafter proceeded abroad as an employee or representative of or under contract with an American institution of research recognized as such by the Secretary of Labor, or as an employee of a firm or corporation engaged in the development of foreign trade and commerce of the United States, or a subsidiary thereof, or any such eligible alien as above defined, who has proceeded abroad temporarily and has within a period of one year of his departure from the United States become an employee or representative of or who is under contract with such an American institution of research, or has become an employee of such an American firm or corporation, no such absence shall break the continuity of residence in the United States if—

"(1) Prior to the beginning of such absence or prior to the beginning of such employment, contract, or representation on behalf of an American institution of research or an American firm or corporation as aforesaid, such alien has established to the satisfaction of the Secretary of Labor that his absence for such period is to be on behalf of such government or for the purpose of carrying on scientific research on behalf of such institution, or to be

engaged solely or principally in the development of such foreign trade, commerce, or whose residence abroad is necessary to the protection of the property rights abroad of such firm or corporation; and

"(2) Such alien proves to the satisfaction of the court that his absence from the United States for such period has been for such purpose.

"An alien who has been lawfully admitted into the United States for permanent residence, and who is the wife or husband of a citizen of the United States so engaged abroad within one of the above-mentioned categories, shall be considered as residing in the United States for the purpose of naturalization notwithstanding any absence from the United States.

"This amendment shall not affect cases of aliens who prior to the date of its enactment have established to the satisfaction of the Secretary of Labor, pursuant to an Act entitled 'An Act to amend the Naturalization Laws in respect of residence requirements, and for other purposes,' approved June 25, 1936, that absence from the United States was to be or had been for the purposes of carrying on activities described therein.

"No period of residence outside the United States during the five years immediately preceding the enactment of this act [June 25, 1936] shall be held to have broken the continuity of residence required by the naturalization laws if the alien proves to the satisfaction of the Secretary of Labor and the court that during all such period of absence he has been under employment by, or contract with, the United States, or such American institution of research, or American firm or corporation, described in section 1 hereof, and has been carrying on the activities described in this act in their behalf."